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Supreme Court, U.S.
FILED

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No.

In The
Supreme Court Of The United States
February Term, 1996

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioner

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents

Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1. On page 2 of the ruling of the court below it stated, "Even if it is assumed that Paul can establish by clear and convincing that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case." Is it an error?

2. The court below stated on p-2 of the ruling, "Paul does not explain why the interests of the absent parties were negatively impacted because they were not joined as defendants in the state court action and he does not explain how the absent parties could have been liable to him under applicable state law." Is it an error?

2(a) The Court below stated on p-2, paragraph 2, "Even if the absent parties were "indispensable," their absence did not create a jurisdictional defect and does not provide a basis for collaterally challenging the state court's judgment." and then dismissed petitioner's appeal, Is it an error?

3. On page 3, the court below stated, 'the contracts at issue were negotiated and executed in Ohio "for performing work in Utah, in Texas, in Louisuana and in Mississippi...." Paul has abandoned this issue by failing to brief it on appeal.' Is it an error?

4. On p 3, the court below stated, "Paul contends that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdiction. Paul's argument goes to the subject-matter jurisdiction of the state court to adjudicate claims arising in other jurisdictions. While the place where the alleged tort occured may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment. see Tex. Const. art 5, § 8." Is this holding an error?

5. On page 4, the court below stated, "Paul's complaint was dismissed under the doctrine of res judicata". Is this holding an error?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners: United States of America ex. rel. Dilip K. Paul

Respondents: U.S.District Court for the Southern District of Texas, Houston Division and Parsons Brinkerhoff, Quade & Douglas Inc., PB-KBB, Inc. and Battelle Memorial Institute

Indispensable parties could not be joined as defendants as per Restatement 2nd § 326 (contract): Thyssen Canada and its two Canadian domiciled employees; S. Poppen and J. Kanopka of Saskatchewan. Thyssen Canada was a PARTIAL ASSIGNEE of the PBQD/PB-KBB's contractual rights and obligations. Also it was a subcontractor for the design of the shaft.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reprinted in the Appendix, Pages 1 through 5.

That opinion affirmed the decision of the United States District Court for the Southern District of Texas, Houston of August 9 and september 6, 1995, denying Paul's motion filed under FRCP 60(b) and under 59 respectively, which are reprinted under Appendix 2 and 3 on pages 6 and 7 respectively.

The original opinion of the district court dismissing petitioner's complaint by applying the doctrine of res judicata is reprinted under Appendix 4 on pages 8 through 16. The order of Magistrate Marcia Crone denying petitioner's motion on discovery is reprinted under Appendix 5 on page 17.

JURISDICTION OF THIS COURT

The U.S. District Court in Houston had exclusive jurisdiction to try this case under 31 U.S.C. §§ 3730(b)(1), 3730 (c)(3), 3730(e)(4)(A) & (B), 3730(h), 3732(a). The U.S. District Court also had the exclusive jurisdiction to try this case under 28 U.S.C. §§ 1331, 1332(a)(2), 1345, 1355, 1357 and 1407. The United States Court of Appeals for the Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. § 1291. The judgment of that Court (Appendix 1) was entered on April 29, 1996. The jurisdiction of the Supreme Court is

invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Statement of the Facts

Battelle Memorial Institute of Columbus, Ohio, invited a bid on behalf of the Office of the Nuclear Waste Isolation (ONWI), Department of Energy in 1981, for designing and supervising of construction of 1/2 mile deep underground exploratory shaft facilities for nuclear waste isolation, to be located

(1) in Utah,
(2) in Texas,
(3) in Louisiana, and
(4) in Mississippi.

Parsons, Brinkerhoff Quade & Douglas, Inc. (hereafter PBQD), and PB-KBB. Inc., forming a joint venture known as PBQD/PB-KBB, and along with six subcontractors with people from six countries, spanning three continents, submitted a bid by falsely claiming their expertise and experience in designing the said facilities in subsurface salt formations containing pressurized pockets of highly explosive Methane gas and toxic Hydrogen Sulfide gas.

One of the subcontractors was the Canadian subsidiary of Thyssen Schachtbau, Mullenheim/West Germany.

PBQD/PB-KBB received a contract (No. E512-08900) in June, 1982, based on the misrepresentation. The contract specified that designs must be safe, suitable for nuclear waste isolation

purpose and they must comply with MSHA regulations which are applicable in gassy mines. The contract required that the designs of the facilities must be completed by the end of 1983, construction must be started at that time and be completed by 1985.

Petitioner was an employee of PB-KBB, in their main office in Houston from mid-April, 1981.

Upon joining the ONWI project office in mid-June, 1982; he determined that the design concepts provided by Battelle would not comply with the written specifications of the executed federal contract. He also determined that essential geological information such as explosive, and toxic gas occurrence data were lacking. Those geological data are essential for properly starting the contracted for design process. Petitioner wrote PBQD/PB-KBB's management that the design process could not be started without those vital geological data.

PBQD/PB-KBB had never designed such facilities in subsurface salt formations or in any formations containing pressurized pockets of explosive and toxic gases. They did not have the knowhow. There are many instances of fatal gas outbursts in salt formations and the contracted for facilities could not be designed without the essential gas occurrence data.

When petitioner was bringing those issues of design and lack of data problems;

Siegfried Poppen and J. Kanopka of Canada, who were in the project office for the shaft design purpose, told PBQD/PB-KBB management that they are experts in such facilities design and only thing need to be done was to do some air cooling, which would take care of the explosive methane and toxic hydrogen sulfide gas occurrence problems. They further told PBQD/PB-KBB that plaintiff should be fired for raising those issues and his tasks should be assigned to them. As a result of Canadians' presentation to PBQD/PB-KBB they were assigned the subsurface design portion of PBQD/PB-KBB's contractual rights and obligations. The partial assignment was for the design of underground openings in which petitioner was working.

PBQD/PB-KBB, as a party to the aforesaid contract, manifested intention to make a present transfer of a part of their rights to Thyssen (Canada), who has accepted the assignment. The partial assignment was thus completed as per Restatement Two of Contract § 324.

The obligor (Battelle/DOE) had knowledge of the assignment which the assignees had already informed. The obligor had accepted the Canadian assignees' performances and made payment to them in return for their work.

The Canadians initially came here to design the shaft. The additional assigned tasks were not in the original subcontract where the Canadians were working.

Petitioner was unaware of the exchanges and about the partial assignment of contract to the Canadians, which were going on behind his back. PB-KBB never truthfully answered interrogatories and evaded the whole truth behind petitioner's firing and about the assignment of his tasks to the Canadians. He was unaware of Canadians' conspiracy to to get him fired and take over his tasks until about November, 1994.

Accordingly, as per the Canadian's conspiratorial representations, PBQD/PB-KBB fired plaintiff from the project office in late July, 1982.

Petitioner then wrote a memo on August 6, 1982, outlining the problems of desgining gassy mine facilities containing pockets of deadly explosive gases. In retaliation, PB-KBB fired him on August 18, 1982.

After he was fired, petitioner filed a complaint with the MSHA, under the Mine Safety Act of 1977. In the meantime PB-KBB contacted plaintiff in September, 1982, for hiring him back.

MSHA told petitioner that he would not be covered under the Mine Safety Act, but told the DOE informing that PBQD/PB-KBB was designing very unsafe facilities for the Nuclear Waste Isolation. MSHA forwarded petitioner's August 6, 1982 memo to the DOE, while expressing their concerns about PBQD/PB-KBB's unsafe designs. DOE then forwarded MSHA's communications with petitioner's memo to Battelle, who in turn, talked to

PBQD/PB-KBB on or about last week of September 29, 1982. PBQD/PB-KBB's initial submission of preliminary design was due on or about October 14, 1982, which Battelle refused to accept as a result of petitioner's complaint to MSHA. As a retaliation for petitioner's informing the MSHA about their fraudulent designs, PB-KBB refused to hire petitioner back.

Petitioner then filed his second complaint to MSHA because of PB-KBB's retaliation in refusing to rehire him back. MSHA again denied petitioner coverage of the Mine Safety Act.

However, as a result of petitioner's complaint to the MSHA, Battelle-PBQD/PB-KBB contract was amended and the schedules for the contract also changed.

Petitioner then filed his complaint to the Federal Mine Safety Review Commission, which also denied plaintiff coverage under the Mine Saftey Act.

Defendant PB-KBB admitted to the Federal Mine Safety Review Commission (FMSRC) proceeding in 1984 that they submitted false bids to Battelle/DOE prior to receiving their contract, and that they did not have the claimed qualification and experience to perform the contracted for tasks. They also stated that they did not care what the Government does with their performed designs. The Administrative Law Judge, Kennedy, told PB-KBB that it would be illegal for them to design unsafe facilities. However, PB-KBB was defiant on Judge Kennedy's

statements.

PB-KBB (its Vice President Jack Schmedemann, representing the company) also stated to the FMSRC that petitioner was fired for complaining about their fraudulent and dangerous designs. PB-KBB also stated that they had vacancies for someone like petitioner in their company, but they were not looking for him, they could not hire him and were looking for someone else to do their work.

However, after stating to the FMSRC that PBQD/PB-KBB did not have the claimed qualifications and experience to design the contracted for facilities, after stating that they submitted false claims as to their qualifications and experience in their bidding documents, they repeatedly signed more and more Government contracts with Battelle to design more facilities. They also repeatedly signed additional amended Gvernment contracts, and repeately submitted false claims to the United States and collected more and more Government money. The submission of false claims continued until 1988, when the Congress cut off the funds for the projects. Needless to say, PBQD/PB-KBB never submitted a single task in six years which complied with the specifications of the contract. Defendants knew all along that they were submitting false claims to the United States, and knowingly submitted false claims from 1982 through 1988.

In the mean time petitioner was unemployed because PBQD/PB-KBB repeatedly

retalited against him by stating to other potential employers that petitioner refused to participate in their fraudulent/and criminal enterprise and he was fired for that reason. Petitioner was told by MSHA, D'Appollonia Engineers, DOE and U.S. Air Force that PB-KBB told them that he was fired for not performing a task. Battelle also retaliated against petitioner by refusing to hire him for not participating in their fraudulent and criminal enterprise and for complaining to the MSHA.

Petitioner then filed his suit in Texas state court in 1987 for wrongful termination. PB-KBB denied to the Texas jury what they admitted to the FMSRC. They denied firing petitioner this time. They denied about submitting fraudulent bids to the United States which they admitted in the FMSRC proceedings, and which are on records. They committed repeated perjury to the Texas jury and changed their defense to suit that jurisdiction's requirements. They stated that petitioner was laid off for lack of work and their design was safe.

They were untruthful, evasive and never told the whole truth during the discoveries and during trial. For example, they never stated that a part of their contractual rights were assigned to the Canadians after firing plaintiff. They intentionally misled the Texas jury by stating that their Pakistani employee, Mahmud Mirza, was designing the facilities, when, in fact, those were designed by the Canadians.

They obtained the judgment in the Texas court by disvowing, denying what they have admitted to the FMSRC, which are in the records. They obtained the judgment by frauds on the court. Their two attorneys repeatedly committed perjuries and submitted false affidavits to the Texas state court and the U.S. district court in the instant case. All of these are in the records.

Their two attorneys, Paul Boulon and Anson Phipps, also lied to this court. Petitioner has records which he can produce and prove these facts.

PB-KBB's most of the fraudulent, false and perjurious testimonies presented during the Texas state court trial are excludable under the doctrine of estoppel. PB-KBB was ESTOPPED to dispute, contradict and deny its prior testimonies given to the FMSRC.

Petitioner brought the instant case in Houston district court against PBQD/PB-KBB and Battelle under the False Claims Act, 31 U.S.C. 31 U.S.C. 3730 (b)(1) to collect money for the United States and for himself under the Qui Tam provision. These claims and issues were never litigated before and could not have been brought during the Texas lawsuit as the condition precedent for such a suit was not satisfied, i.e. the fraudulent design contracts were still in progress at that time. The case for fraudulent designs could not be filed and proven as long as they were working on those. Besides, PBQD/PB-KBB and their two attorneys have proven track records of

frauds, perjuries and misrepresentations.

Petitioner also brought the instant case under 31 U.S.C. 3730(h) to collect for his damages caused by the defendants, for unlawfully firing him, for refusal to hire him back, for defaming him, for blackballing him, for causing special damages to him and for causing mental distress to him.

PBQD/PB-KBB and their two attorneys not only perpetrated frauds on the courts, they have caused collapse of this country's nuclear waste isolation projects where the Government have spent more than $25 billion. They defrauded the Government for more than six years, 1982 through 1988, and have not produce a single piece of paper complying with the contract specifications. They caused damages to the petitioner and ruined his career and ruin his family in the process, too.

PB-KBB and its two attorneys acted in such a daring manner, submitted its motion under FRCP 12(b)(6) and under FRCP 56(b), as if their prior testimonies, which are on records, did not matter. Petitioner submitted motions for sanctions under FRCP 11 and under FRCP 56(g), which were denied by the district court below.

The original case dealt only with the Texas design sites and the designs in made for other states were never litigated.

The instant case deals with contracts

which was negotiated in Ohio for performing in Utah, in Texas, in Louisiana and in Mississippi.

The instant case deals with an indispensable party, Canadian domiciles, who as partial assignee and subcontractor of PBQD/PB-KBB, conspired to defraud the United States, did the fraudulent design performance under a federal contract.

The same indispensable party, who conspired to have petitioner fired and who had taken over his job assignments. These facts are the newly discovered evidence. Petitioner learnt about these from Harry Gleser, who was in the ONWI project office and who told petitioner about these in November, 1994.

The courts below dismissed plaintiff's complaint by citing res judicata due to the Texas court litigations. Petitioner believes that res judicata was improperly used, and the courts' rulings do not satisfy the requirements of Restatement Second of Judgement.

Petitioner learnt about PBQD/PB-KBB's partial assignment of contracts to the Canadians in late 1994, and this motion was brought under FRCP 60 (b)(2), 60(b)(3) and 60(b)(4), which were denied. Petitioner then brought additional evidence under FRCP 59, which was also denied.

The court below summarily dismissed petitioner's appeal.

REASONS FOR GRANTING WRIT
Summary of Arguments

The case involves summary decisions of the courts below where, petitioner believes, a number of errors were made. The instant judgment, entered by applying the doctrine of res judicata, is void as the Harris County Court which entered the original judgment, did not have territorial jurisdiction to try a case where frauds and tortious acts perpetrated in Utah, in Louisiana and in Mississippi by an indispensable party who is Canadian domiciled, under a contract which is executed in Ohio.

These decisions do not comply with the U.S. Constitutional requirements and the long standing holdings of this court and those of other circuits.

Besides, the respondents are unscrupulous and they have knowingly caused material damages to this country's nuclear waste isolation projects. If the rulings of the courts below are allowed to stand, a series misconducts by a group of cheaters inside the courts and outside, over a number of years, will remain unaddressed. In that case other wrongdoers will also get encouraged in fraudulent activities.

A Number of Important Questions of First Impression Before This Court

Arguments under Question No. 1

Paul was unable to fully and fairly present his State court case.

In this holding, the court below presumed that petitioner should have been aware of PB-KBB's frauds on the court and he should have brought those in the Texas state court. This presumption is inconsistent with the facts of the case.

The court below reached its conclusion without any factual basis. It refused to hear any oral argument, which the petitioner requested which could have clarified the issue.

Petitioner was not living in Houston since July 5, 1988, and was not near where his attorney was living. The ltigation papers were with his attorney and in the court. So the petitioner could not actively participate in the litigation process from California. He did not realize that PB-KBB would be allowed to deny unlawfully in the State court what it had admitted to the earlier tribunals.

Petitioner was living in California at the time defendant committed the perjuries and used fraudulent tactics in the Texas court lawsuit. Also the trial took place on an unscheduled date. There was another trial which was to take place on that date, but the parties to that case either settled or rescheduled their calender. As there was a gap in the court's calender, petitioner's case was started by his ex-attorney during that gap. Petitioner was in Bishop, California, when his ex-attorney's wife called informing that his case was already in progress in Houston. By the

time petitioner went to the court in Houston, most of the hearing was over. So petitioner did not even hear most of the fraudulent and perjurious testimonies presented by PB-KBB in front of the Jury. So he could not have challenged something in front of the jury which he did not or could not hear. Almost all of the PB-KBB's presentations contradicted their prior testimonies to the FMSRC.

Besides, petitioner did not have any litigation papers or earlier courts records with him at that time to present to the Texas courts.

Petitioner was not even aware of the fraudulent practices are in progress in the state court until he filed the instant lawsuit and received litigation materials in California from his ex-attorney in Texas. Petitioner did not even suspect that PB-KBB and its two attorneys were presenting evidence in the state court by perjurying, denying, contradicting and disputing their prior testimonies to the Federal Mine Safety Review Commission's proceedings, which are in the records.

PB-KBB stated to the FMSRC that petitioner was fired for complaining about their fraudulent and dangerous designs. PB-KBB also stated that they had vacancies for someone like petitioner in their company, but they were not looking for him. PB-KBB also stated that they could not rehire petitioner because of his complaints about the fraudulent designs and were looking for someone else to do their work.

But in the Texas State court PB-KBB told the Jury that petitioner was laid off for lack of work. PB-KBB thus illegally obtained the State court judgment by presenting false and perjurious testimonies to the jury when the petitioner was not in the Court. Petitioner was in California at the time and was travelling to Houston to attend the trial.

Besides, most of PB-KBB's testimonies presented in the Texas court are not admissible in that state because these are illegal and excludable by the rule of evidence in that state. PB-KBB was estopped to deny, contradict and dispute their prior testimonies, which are on records.

Besides, in Texas, the laws of evidence prohibits, presenting such testimonies disputing, denying and contradicting its prior testimonies given to another tribunal; Texas Title 55 (Evidence, Article 3713, Rule 37, note 12 through 20). These evidences are also excludable under Texas Rules of Civil Procedure, as well. see Tex. Rule 169, Pre Trial Procedure, also Rule 184, Evidence.

So the Texas judgment was VOID as it was obtained illegally, by violating that state's own codes, laws and regulations.

Further, the holdings of the court below also do not comply with the requirements of Rule 60(b)(3), which states,

"On motion and upon such terms as

> are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconducts of an adverse party.

The issue of extrinsic and intrinsic Frauds, which the court below apparently relied on, have been eliminated under FRCP 60(b) Ruling procedures.

The court below obviously erred on this issue here.

Arguments under Question No. 2.

The absent party, the Canadians, would be liable to petitioner as they conspired to have him fired and took over his job functions. PB-KBB took advantage of their absence in the State court by stating that petitioner was laid off for lack of work, when the work was assigned to the Canadians. Petitioner was thus adversely impacted because of their absence.

The court erred again on factual ground here. The instant case was filed on contract and contract laws governs. Defendants committed frauds and torts after entering the contract. The court's cited case laws are inapplicable in the instant case.

The Canadians are an indispensable party

Due to the perjury and fraudulent litigation tactics of PB-KBB, petitioner did not learn about the Canadians' conspiracy to have him fired at the time of state court trial.

PB-KBB claimed in the state court that plaintiff was laid off due to lack of work after assigning his job functions to the Candians. PB-KBB could not commit frauds and perjuries in the state court if the Canadians were brought in the trial. Further, PB-KBB misrepresented that Pakistani, Mahmud Mirza, was designing the facility when, in fact, the Canadians were designing. These two misrepresentations have adversely impacted plaintiff's interests.

The court below should have allowed oral testimonies prior to dismissing the appeal arbitrarily.

In the instant case, the Canadians are an idispensable party for the above reasons and for a different reason. PBQD/PB-KBB, as a party to the aforesaid contract, assigned of a part of their rights and obligations to Thyssen (Canada), who has accepted the assignment.

Due to the partial assignment of PBQD/PB-KBB's contract to the Canadians, they become an indispensable party in proceeding as per RESTATEMENT (Second) of CONTRACT § 326, which states,

> "If the obligor has not contracted to perform separately the assigned part of a right, no legal proceeding can be maintained by the assignor or

assignee against the obligor over his objection, unless all persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder."

In the instant case petitioner represent the obligor. The Canadians, being partial assignee, are indispensable party in the instant case. Without them being made a party, the original judgment as well as the instant judgment, both are void.

As there is an indispensable party in the instant case, who are Canadian domicile, the instant case could not be brought in the Harris County court.

In view of the above, res judicata was erroneously applied in the instant case and petitioner's claims were unalwfully extinguished.

Arguments on Question No. 2(a)

Both of the original judgment as well as the instant judgment, both, are void. Hence these judgments are subject to collateral and direct challenge.

There are two separate issues here as there are two separate cases. The first isssue is whether the original state court judgment is valid. The second issue is whether instant case is res judicata when one of the indispensible party in this litigation is a Canadian domicile, even if the state court

judgment cannot be collaterally attacked.

When an indispensable party in the litigation was left out, the judgement entered is void and is subject to collateral attack. When it is obvious that bringing that party in the litigation, the state court could not try the case, judgment entered in the state court is subject to collateral attack.

Further, res judicata cannot be applied arbitrarily when it is clear from the evidence presented that the instant case could not have been brought in the state court. The judgment of the district court is directly attacked in this appeal.

As per Article III, Section 2 of the United States constitution, one of the defendants, an indispensable party, being Canadian domicile, the instant case cannot be brought in the Texas state court. Hence the judgment entered in the instant case, by giving full faith and credit to a void state court judgment, and by applying the doctrine of res judicata, is void.

When a judgment is void, the courts below, under FRCP 60(b)(4) motion, should have vacated the judgment. The courts did not have the discretion to upheld a void judgment, which is a legal nullity.

Arguments under Question No. 3.

Petitioner briefed the issue on appeal and did not abandon it.

The followings are the facts:

The court below misapprehended the facts of the case, entered summary judgment and made several factual and legal errors.

Petitioner briefed this issue on appeal in his statement of the Case, in his Issue Nos. 2, 3, and in his Issue No. 5, and in his arguments made under those issues. The issue was not abandoned.

Further, petitioner brought the instant case against the defendants for defrauding the United States under contracts. However, the court below cited case laws which are not governed by contract laws and are not applicable in the instant case.

The issue have been repeatedly briefed in the district court: e.g Paul's pleading of December 9, 1993, [CIV ACT H-92-2792] p. 18 stated,

> "---The State court do not have the jurisdiction to try false claims act related actions. Besides the case at bar involves defendants performance of field services in Mississippi, in Texas and in Utah, under a federal contract, requiring compliance of a number of federal statutes. The prime contractor Battelle is from Ohio. The contract is for the DOE with headquarters in Washington, D.C., and is operated from it's office in Chicago, Ill. and from Columbus, Ohio. Defendant Parsons and Brinkerhoff is based on New York City, and its officers based on that

> location made the false claims to the United States in 1981, while securing the contract. Defendant K.B.B. GmbH is based in Germany, and is owned by two large Oil and Oil Service Companies based in that country. The policy of its operation is conducted from Germany. From this fact, the court can see that Texas state court do not have the jurisdiction to try this case. Hence defendant's argument under this section is totally misplaced".

Further, petitioner submitted to the district court "LETTER CONTRACT NO. E 512-08900, A-E SERVICE FOR AN EXPLORATORY SHAFT FACILITY----" on November 2, 1993, as his Exhibit-1, and he repeatedly cited on it.

Again, petitioner pleaded on pp. 8-9 of his response on November 8, 1993, mentioned defendants' design reports on sites located in 4 states:

1. REPORT ON GULF INTERIOR REGION: ONWI-496.

2. REPORT ON PARADOX BASIN : ONWI-497.

3. REPORT ON PERMIAN BASIN :ONWI-498.

4. 2nd REPORT ON GULF INTERIOR REGION- To plaintiff's knowledge, never written."

Petitioner also submitted ONWI-498 to the district court on November 2, 1993 as his Exhibit 5(a).

Petitioner then submitted ONWI-496 and

ONWI-497 as his Exhibit No 5(c) and 5(d) to the district along with his Rule 60(b) motion on-5/17/95.

Petitioner again brought this issue in the district court along with his Rule 59 motion.

Petitioner then brought this issue in the appeals court in his "STATEMENT OF THE CASE" which stated,

> "Battelle Memorial Institute invited a bid on behalf of the U.S. Department of Energy (DOE), Office of the Nuclear Waste Isolation (ONWI), in 1981, for designing 1/2 mile deep underground exploratory shaft facilities in Utah, in Texas, in Louisiana and in Mississippi."

On appeal, petitioner's Issue No. 3 stated,

> "Whether Harris County court has the authority to try a case arose under the False Claims Act, where intentional torts and frauds have been perpetrated against the United States in Utah, in Texas, in Louisiana and Mississippi, by people who are undocumented foreign citizens?"

In argument on this issue, petitioner stated,

> "As per Gray V. American Radiator & Standard Sanitary Corp, 22 Ill 2d 432, 176 NE 2d (1961), and as per Murphy v. Erwin-Wassy, Inc., 460 F.

2d 661, 664 (1st Cir. 1972) the jurisdiction ti try the case of intentional torts liabilities in those counties where the victims would be affected. Hence the intentional torts or criminal mine design would not affect the people of Harris County, but would affect the people of the seven counties spreading over four states where the Federal facility sites are located. So the jurisdiction to try the instant case would be in those seven counties and not in the Harris County, Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1877). This would be the case if the perpetrators were all U.S. domiciles".

"But when the perpetrators were foreign citizens, domiciled in Canada and in other countries, the Harris County court would lack the in personam jurisdiction over the parties to try the case and the instant case can only be tried in a U.S. court."

"Further, the solicitation, bidding and the execution of the Battelle-PBQD/PB-KBB contracts at issue were done from Columbus, Ohio. Under Burger King v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d. 578, the jurisdiction to try the instant case will be in Ohio. Again, Harris county district court could not try the instant case."

Similar arguments were made under Issue No. 5 on appeal.

Petitioner, again repeatedly brief this issue in his reply brief on 1/16/96.

From these aforesaid cited facts, the court can see that petitioner did not abandon the issue on appeal.

From the above, petitioner contends that the issue of territorial jurisdiction was well pleaded in the district court and in the appeals court, the court below erred in its ruling, and this court should grant certiorari to the court below.

Further, the court below erred in its conclusion on this issue. The summary judgment was entered by applying the doctrine of res judicata. The court below should have looked at whether the instant case could have been brought in the Texas state court, or the Texas courts have ever tried such a case in contract. Obviously, this could not be done. Hence, judgment of the court below is void and this court should vacate it.

Arguments under Issue No. 4

The holdings of the court below do not meet the U.S. Constitutional requirements and is, therefore, void.

The court below is clearly made error on this holding. Texas constitutional clause cannot authorize it to exercise jurisdiction over those causes of action which arose in Utah, in Louisiana and in Mississippi, disregarding the U.S. constitutional requirements.

Article 5, § 8 of Texas Constitution states,

> "District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction."
>
> "The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law"

There is not a single case listed under Tex. Const. art. 5, § 8, where the court of that state adjudicated the issues which arose in Utah, in Louisiaba and in Mississippi.

Further, this holding will not meet the requirements of Restatement of Judgment (Second) § 92, which states stipulates the Requisite of a Valid Judgment.

> A Judgment is valid if
>
> (a) the state in which it is rendered has jurisdiction to act judicially in the case; and
>
> (b) a reasonable method of notification is employed and a

reasonable opportunity to be heard is afforded to persons affected; and

(c) the judgment is rendered by a competent court; and

(d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.

In the note (e) under the above Restatement, it is stated,

(e). "Necessity of judicial jurisdiction. A judgment is valid only if the state where the judgment was rendered had jurisdiction, as defined in § 24, to act in the case".

In the note (f) under the above Restatement, it is stated,

(f). "Exercise of judicial jurisdiction by state restricted by federal constitution.

'----- Thus, a state of the United States may not exercise jurisdiction through its courts when to do so constitutes a violation of any clause of the Constitution of the United States as interpreted by the Supreme Court.' "

This court in Hall v. Lanning, 91 U.S. 160. 23 L.Ed 271, hold that

the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of

such court is always open to inquiry, and in that respect, the court of another state is to be regarded as foreign court.

The holding of the court below does not meet the requirements of this case law.

Further, Restatement of Judgments (Second) § 103, states on the Limitations on Full Faith and Credit

> "A judgment rendered in one state of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with the important interests of the sister State."

The holding of court below will not comply with this provision of the Restatement.

Also the same holding will not comply with § 105 and § 110 of the same Restatement of Judgments (Second).

The court should therefore vacate the judgment of the court below.

Arguments underon Question No. 5

By applying the doctrine of res judicata petitioner's claims in the instant case could not be extinguished. The followings are the facts.

Petitioner's original case was for wrongful discharge in a Texas design case under a 1982 contract in the Texas state court.

The original case was:

Dilip K. Paul v. PB-KBB Inc.

The instant is for defrauding the United States in the U.S. District court.

U.S. ex rel. Dilip K. Paul
v.

Parsons, Brinkerhoff, Quade & Douglas Inc., PB-KBB Inc. and Battelle Memorial Institute.

The instant case is over a contract which reqires performance in 4 different states.

That contract was amended at least 4/5 times in response to petitioner's lawsuits. The locations and sites and other contract data changed at least 4/5 times over the 6/7 years period.

From these facts, the court can see that the court below erred in holding that petitioners claims are res judicata, by applying Restatement of Judgment (Second).

A judgment on the Texas portion of a contract cannot extinguish petitioner's claims arose in Utah, in Mississippi and in Louisiana. Further res judicata in Texas is governed by Texas law. So Texas law cannot be used to extinguish

petitioner's claims arose in other jurisdictions.

Further, the instant case cannot be brought and tried in a Texas state court. Petitioner looked at the entire Texas Digest but did not find a single case where False Claims related cases were tried. Petitioner also did not find a single case which parallel to the instant case and which was tried Texas. Obviously, this cannot be done without violating the U.S. Constitution.

Under such a circumstances, it was erroneous for the courts below to held that petitioners claims are res judicata. The doctrine judicata cannot be applied if both of the original case and the instant case cannot be tried by the same court. Further, causes of both of the cases must be ripe for action when the initial case was brought in. That is also not the case here.

Obviously it was erroneous for the courts below on this holding.

CONCLUSIONS

There are a number of material errors made by the courts below. The False Claims Act requires petitioner to provide only preponderance of evidence. The court below repeatedly insisted on clear and convincing evidence in a summary proceeding.

The Congress enacted the False Claims Act to deal with this type of entities. The holdings of the courts below will

encourage cheaters.

The rulings of the court below will not comply with requirements of U.S. Constitution, this court's rulings and rulings of other circuits.

A Judgment is void when the court rendering it lacks subject matter jurisdiction, territorial jurisdiction, in personam jurisdiction over a party, lacks the authority to pass the judgment, and if the procedures adpoted do not comply with the due process of law.

Petitioner has shown repeatedly here in above that the judgment of the court below is void in all of the aforesaid counts, and this court must not allow it to stand.

For the Forgoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

Dilip K. Paul

Dilip K. Paul
Petitioner, Pro Se

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APPENDIX 1.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20733
Summary Calendar

DILIP KUMAR PAUL, ET AL.,
Plaintiffs,

DILIP KUMAR PAUL,
Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE, & DOUGLAS; PB-KBB, INC., BATTELLE MEMORIAL INST.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
USDC No. CA-H-92-2429

Before JOLLY, JONES, and STEWART, Circuit Judges.
PER CURIAM:*

Dilip Kumar Paul has appealed the denial of his Fed. R. Civ. P. 60(b) motion for

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

relief from the district court's Judgment dismissing his qui tam action under the False Claims Act, 31 U.S.C. §§ 3730, et seq. Paul contends that the state court's judgment, which this court previously held, precluded consideration of his substantive claims under the doctrine of res judicata, is void because it was obtained by means of perjury and fraudulent litigation tactics on the part of the defendants. Even if its assumed that Paul can establish by clear and convincing evidence that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case. Therefore, Paul has failed to show that the district court abused its discretion in denying his motion under Rule 60(b)(3) because of "fraud, misrepresentation, or other misconduct of an adverse party." Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992).

Paul contends that the state court judgment was void because essential parties could not be joined. Paul does not explain why the interests of the absent parties were negatively impacted because they were not joined as defendants in the state court action and he does not explain how the absent parties could have been liable to him under applicable state law. see Vondy v. Comm'rs Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981); Tex R. Civ. P. 39. Even if the absent parties were "indispensable," their absence did not create a jurisdictional defect and does not provide a basis for collaterally

challenging the state court's judgment. See Judwin Properties, Inc. v. U.S. Fire Ins. Co., 973 F.2d 432, 434-35 (5th Cir. 1992); United States v. O'Neil, 709 F.2d 361, 371 (5th Cir. 1983); see also Cox v. Johnson, 638 S.W.2d 867 (Tex. 1982).

Paul contends that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdictions. Paul's argument goes to the subject-matter jurisdiction of the state court to adjudicate claims arising in other jurisdictions. While the place where the alleged tort occurred may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment. See Tex. Const. art. 5, § 8.

Paul also argued in the district court that the state court lacked personal jurisdiction because the contracts at issue were negotiated and executed in Ohio "for performing work in Utah, in Texas, in Louisiana and in Mississippi.....". Paul has abandoned this issue by failing to brief it on appeal. See Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987)

Paul argues that his claims against parties who were not named in the state court suit are not res judicata. This court has already found that there was

privity among all of the defendants and that the claims against them are res judicata. Paul argues that the district court should have granted his Rule 60(b) motion based upon newly discovered evidence. He does not identify in his argument what the newly discovered evidence showed or how it would have affected the district court's judgment.

Paul argues that his FCA claims could not have been barred under the doctrine of collateral estoppel. Paul's complaint was dismissed under the doctrine of res judicata. Paul argues that a magistrate judge cannot rule on matters materially affecting his interests without his consent. The magistrate judge did not rule on Paul's Rule 60(b) motion. Paul argues that he should have had an opportunity to conduct discovery. The lack of an opportunity for discovery does not involve the sort of compelling circumstance that might provide a basis for relief under Rule 60(b)(6).

Paul has not shown that the district court abused its discretion in denying his Rule 60(b) motion for relief from the judgment. His appeal is frivolous and is DISMISSED. See Howard v. King 707 F.2d 215, 219-20 (5th Cir. 1983) 5th Cir. R. 42.2. Paul is cautioned that any additional frivolous appeals filed by him will invite imposition of sanctions. To avoid sanctions, Paul is further cautioned to review any pending appeals to ensure that they do not raise arguments that are frivolous because they have been previously decided by this court.

APPEAL DISMISSED, SANCTIONS WARNING ISSUED.

Appendix 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. DILIP KUMAR PAUL	§	
Plaintiff,	§	
v.	§	CA NO H-92-2429 (c/w CA NO H.92-2792)
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., and P.B.-K.B.B	§	
Defendant.	§	

ORDER

Pending before the Court is the Motion Under Rule 60(b) of the Federal Rules of Civil Procedure (Document #60) filed by plaintiff Dilip Kumar Paul ("Paul"). Having considered the motion, submissions, and applicable law, the court determines that the motion should be denied. Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion Under Rule 60(b) is DENIED.

SIGNED at Houston, Texas, on this 9 day of August, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Appendix 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. DILIP KUMAR PAUL	§	
Plaintiff,	§	
	§	CA NO H-92-2429
v.	§	(c/w CA NO H.92-2792)
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., and P.B.-K.B.B	§	
Defendant.	§	

ORDER

Pending before the Court is the Motion Under Rule 59 of the Federal Rules of Civil Procedure (Document #66) filed by plaintiff Dilip Kumar Paul ("Paul"). Having considered the motion, submissions, and applicable law, the court determines that the motion should be denied. Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion Under Rule 60(b) is DENIED.

SIGNED at Houston, Texas, on this 6 day of September, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	(Consolidated with Civil Action
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	No. H-92-2792
Defendants.	)	

ORDER

Pending before the Court is the Motion to Dismiss, or in the alternative, motion for Summary Judgment and Renewal of Request for Sanctions filed by defendants Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQ&D). Having considered the motion, submissions, and the applicable law, the Court determines that the motion to dismiss should be granted and request for sanctions denied. The Court further determines that defendant Battelle Memorial Institute (BMI) should be dismissed sua sponte for the same reasons stated herein.[1]

Plaintiff Dilip Kumar Paul (Paul) initiated this cause of action pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §3730, *et seq.*, against PBQ&D, and PB-KBB. Although the False Claims Act provides the United States

[1] A district court may dismiss a case upon its own motion. ------ *v. Brazos County*, 981 F.2d 237, 242-43 (5th Cir.)43

Government the opportunity to intervene in a qui tam suit brought under the Act, the United States elected not to intervene in this case. See Document 15. In the complaint, Paul alleges that the defendants "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the Government...a false or fraudulent claim for payment or approval." 31 U.S.C. §3726(1). A similar cause of action brought against BMI was consolidated with the instant case.

Paul was first employed by PB-KBB, an engineering firm, in June 1981. In June 1982, PB-KBB and PBQ&D formed a joint venture (PB/PB-KBB) to function as subcontractor to BMI. Since 1978 BMI has been responsible for the management of the United States Department of Energy's (DOE) National Waste Terminal Storage Program. PB/PB-KBB was employed by BMI to design an exploratory shaft for a nuclear waste storage project for the DOE. On October 7, 1982, the DOE approved the subcontract and on November 23, 1985, BMI assigned the subcontract to the DOE. As a result of the assignment, PB/PB-KBB submitted all of its claims for payment directly to the DOE. It is the submission of these claims for payment by PB/PB-KBB to DOE that Paul alleges were fraudulent and form the basis of his False Claims Act causes of action.

When the joint venture was formed in June 1982, Paul was selected as a mining engineer on the project. Paul was instructed by PB- KBB to perform a trade-off ventilation study. *Paul v. PB-KBB, Inc.*, 801 S.W. 2d 229 (Tex. App.--Houston [14th Dist.] (1990), writ denied).[2] By mid-July 1982, Paul had not completed the trade-off study and was transferred to the "Infrastructure" division of PB-KBB. During the first part of August 1982, Paul was discharged.

[2]This case refers to a state court suit filed by Paul against PB- KBB.

Following his dismissal, Paul filed suit against PB-KBB in Texas state court alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. *Id.*[3] Paul claimed that "the preliminary study called for one shaft rather than two and [the preliminary study] design 'could've [sic] killed people.'" *Id.* Paul argued that he was fired for his objections to the project. *Id.* After a jury verdict for Paul's employer was affirmed by the Texas Court of Appeals, Paul filed this complaint.

PBQ&D and PB-KBB contended that this case should be dismissed on the following basis: (1) *res judicata*; (2) the lack of federal court jurisdiction; (3) the failure of Paul to allege "fraud" and "guilty intent" under the False Clams Act; (4) the failure of Paul to state a cause of action for retaliation under the False Claims Act; and the expiration of the statute of limitations. The Court finds that because Paul could have raised the False Claims Act allegations contained in the complaint when he filed the prior state action, the principle of res judicata supports dismissal of his complaint in this action.

When a decision is rendered on the merits of a case by a court of competent jurisdiction, the judgment is conclusive for the parties and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 443 U.S. 109, 129-30 (1983).

As the prior lawsuit was brought in Texas state court, this court will give full faith and credit to the state court judgment pursuant to 28 U.S.C. §1738, and will apply in its evaluation of the effect res judicata has on the complaint. *Hoque v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir. 1991).

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[3]Paul has filed two other causes of action against PB-KBB. See Document #30 at 3-4.vi

In order for res judicata to apply, four requirements must be met: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction on the merits; and (4) the same cause of action must be involved in both cases. *Eubanks v. F.D.I.C.*, 997 F.2d 166, 169 (5th Cir. 1992). In this case, the second and third requirements have been met as the prior lawsuit was adjudicated by the state court and affirmed by the Texas Court of Appeals. See *Paul, supra* at 229.

The first and fourth requirements for the application of res judicata, that "the parties...be identical in both suits," and that "the same cause of action...be involved in both cases," are the two issues for consideration in review of the defendants' motion to dismiss. *Eubanks, supra* at 169.

Pursuant to Texas law, the first requirement for the application of res judicata to bar a subsequent cause of action, the "identity of parties" test, does not demand strict identity. Rather, parties in the subsequent action are considered "identical" to parties in the previous action if the non-parties are in privity with the earlier parties. *Getty Oil v. Insurance Co. of N. America*, 845 S.W.2d 794, 800 (Tex. 1992) (stating that there is no general definition of privity that can be automatically applied in all *res judicata* cases; the circumstances of each case must be examined). Having examined the relationship between PBQ&D and PB-KBB, this court finds the requisite privity to bar this complaint. In addition, the court finds privity between BMI the general contractor, and PBQ&D and PB-KBB, the subcontractors.

PBQ&D has asserted two related grounds to support its privity argument with PB-KBB. First, PBQ&D argues that its liability is derivative of PB-KBB's, and therefore the False Claims Act cause of action against PBQ&D should be barred. PBQ&D cites Texas law which holds that "where the rights and liabilities of a party are derivative, a judgment

derived may be set up as a bar in the second suit." *Lemon v. Spann*, 633 S.W.2d 568, 570 (Tex. App.--Texarkana 1982, writ ref'd n.r.e.) .

PBQ&D's second argument to establish privity centers on the fact that PBQ&D was one of the joint venturers, along with PB-KBB, to which BMI subcontracted the design of the exploratory shaft facility. The gravamen of Paul's complaint is that PBQ&D and PB- KBB acted together to defraud the government. Paul continually refers to PBQ&D, BMI, and PB-KBB simply as "defendants" when alleging wrongdoing. Paul's allegations against the defendants are virtually identical. Thus, PBQ&D maintains that privity exists between the defendants and *res judicata* bars Paul's complaint.

PBQ&D also claims that because it is joined as a defendant with PB-KBB in the complaint, it is in a vicarious relationship with PB-KBB. In situations of vicarious liability, a judgment for one of the parties in the vicarious relationship bars a later action against the other. Thus, PBQ&D maintains that Paul's complaint against it should be dismissed as a result of PB-KBB's success in the state court action. *Soto v. Phillips,* 836 S.W.2d 266, 269 (Tex. app.--San Antonio 1992) writ denied (citing Restatement [Second] of Judgments 51(1) (1982)). As a general contractor, BMI is also in a vicarious liability relationship with its subcontractor, PB-KBB. See e.g., *United States v. Blair*, 321 U.S. 730 (1944).

There are two exceptions to the rule that bar an unsuccessful plaintiff from reasserting a claim against a subsequent defendant alleged to be vicariously liable to the original defendant. Such a claim may not be reasserted unless: (1) the claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (2) the judgment in the action was based on a defense that was personal to the

is a defendant in the first action. Restatement (Second) of Judgments §51(1) (1982). In this case, the complaint is based upon Paul's allegation that PB/PB-KBB and BMI submitted "a false or fraudulent claim for payment or approval [to the DOE]." §31 U.S.C. §3729(1). Paul alleged in the prior lawsuit that his certifying design plans for the project, which he believed were dangerous, would have constituted a violation of §22.05 of the Texas Penal Code, which proscribe "reckless conduct." Paul alleges that his refusal to certify the plans resulted in his termination. In addition, if Paul would have certified the project design,he would have played a role in the submission of the allegedly false claim to the DOE. Given the similarity between the two claims, the grounds for this complaint in this case could have been asserted in the first action.

The second exception also does not apply. The concept of "personal defense" is addressed by the Texas Business and Commercial Code in its explanation of the rights of the holder in due course of a negotiable instrument. A holder in due course may take an instrument free from all defenses of any party to the instrument with whom the holder has not dealt, except personal defenses. Tex. Bus. & Comm. Code §3.305 (1967).[4] Because PB- KBB's defense to the wrongful discharge action was not a personal defense, the second exception does not apply.

---

[4]The Texas Business and Commercial Code defines the five personal defenses as: (1) Infancy...; and (2) such other incapacity, or dures, or illegality of the transaction, as renders the obligation the party a nullity;... (3) ...misrepresentation [that] has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms;... (4) discharge in insolvency proceedings; and (5) any other discharge of which the holder has notice when he takes the instrument. Tex. Bus & Comm. Code §3.304 (1967).

Res judicata operates on the principle that any cause of action which arises out of the same facts should, if practicable, be litigated in the same suit. *Barr*, 837 F.2d at 631. A different cause of action has been defined by Texas courts as "one that proceeds not only on a sufficiently different legal theory but also on a sufficient different factual footing." *Hoque,* 937 F.2d at 1253. To be considered "different," the cause of action must differ in the theories of recovery, the operative facts, and the measure of recovery. *Id.*

In examining the above three factors, Texas courts have utilized the transactional approach to claim preclusion. *Barr*, 837 F.2d at 631. The transactional approach "provides that a final judgment an action extinguishes the right to bring suit on the transaction, or a series of connected transactions, out of which the action arose." *Id.* In analyzing the transactional approach, factors to be considered are: (1) whether the facts are related in time, space, origin, or motivation; (2) whether they form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *Id.* (Quoting Restatement of Judgment 24(2).)

In this case, the complaint arose form the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in those activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

The second factor of transactional approach, whether the two clams could have formed a "convenient trial unit, "

The following is a jurisdictional question. Whether the state court had jurisdiction over the federal False Claims Act claims is a question of first impression in this circuit. After a thorough review of other jurisdictions, it appears that only one other court has decided the question whether there is exclusive federal jurisdiction over cases brought pursuant to the False Claims Act. In *United States ex rel. Hartigan v. Palumbro Bros., Inc.*, the court held that there is concurrent jurisdiction over the False Claims Act cases.[5]

In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court discussed concurrent jurisdiction in holding that federal civil RICO suits could be brought in state court. The Court recognized that it has "consistently held that state courts have inherent authority and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* at 460. State courts are courts of general jurisdiction. When a federal statute intends that claims arising under it be litigated in a specific jurisdiction, the statute will explicitly state that suit may be brought "only" in federal court, or that the jurisdiction mentioned by the statue shall be "exclusive." *Id.* at 801 (Scalia, J. concurring). If exclusive jurisdiction is neither express nor implied by the statute, state courts will have concurrent jurisdiction. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

The False Claims Act states that an action arising under it "may" be brought in federal court. 31 U.S.C. §3732 (1876). Thus, pursuant to the language of the statute, there is concurrent jurisdiction between the federal and state courts. See *Charles Dowd Box Co. v. Courtney*, 638 U.S. 502 (1962).

Finally, the third element of the transactional approach to claim preclusion states that future claims will be barred if it is reasonable to presume that the parties would expect the two actions to be treated together in the original case.

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[5]597 F.Supp. 624 (N.D. Ill. 1992)

Inasmuch as the facts and claims in the state and federal cases are almost identical, it is apparent that the two cases could have been tried together. See *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D. Mass. 1841) (No. 10, 406). Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion to Dismiss is GRANTED and the request for Sanctions is DENIED. It is further ORDERED that the complaint against BMI is DISMISSED. All relief not specifically granted herein is DENIED

SIGNED at Houston, Texas, on this 29 day of July, 1994.

----s----

DAVID HITTNER

United States District Judge.

Appendix 5

THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	
Defendants.	)	

ORDER

Defendants' Motion for Protective Order (Docket Entry #33) is GRANTED.

Plaintiff's Motion to Compel Discovery (Docket Entry #39) is DENIED.

It is ORDERED that Defendants shall respond to Plaintiff's Request for Production of Documents on or before 30 days after the date the Court rules on defendants' Motion to Dismiss.

SIGNED at Houston, Texas, on this 8th day of February, 1994.

----s----
Marcia A. Crone
United States Magistrate Judge